



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**REGION 4
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-8960**

February 6, 2023

Mr. Michael Lynch, Director
Division of Water Resource Management
Florida Department of Environmental Protection
2600 Blair Stone Road
Mail Station 3500
Tallahassee, Florida 32399

Subject: FDEP Permit App. No. 409588-001-SFI
2008 FL Recovery Limited Partnership by GBR Properties, Inc.
Attn: Russell Richardson

Dear Mr. Lynch:

This letter is being sent in response to the Florida Department of Environmental Protection's (FDEP's) above-referenced public notice (PN) for a Clean Water Act (CWA) Section 404 permit application dated November 7, 2022. This application is requesting authorization to create a ~409-acre multi-use residential and commercial development along the Gasparilla Road/McCall Road intersection, Port Charlotte, Florida in Charlotte County. The PN describes the proposed work as involving 1.64 acres of jurisdictional Waters of the United States (WOTUS) impacts but also indicates there are impacts within 6.56 acres of "non-WOTUS, non-jurisdictional wetlands ditches, and surface waters." FDEP confirmed the Department's application of the 2020 Navigable Waters Protection Rule (NWPR) in email correspondence to EPA on February 2, 2023.

FDEP notified the EPA that FDEP is currently implementing its CWA Section 404 program using the 2020 NWPR to interpret the definition of "waters of the United States." As communicated to FDEP in a letter issued to your office dated December 9, 2021, the CWA and its implementing regulations require Florida to implement its program consistent with the current definition of "waters of the United States," which the EPA and the U.S. Army Corps of Engineers interpret to be the pre-2015 Rule regulatory regime following vacatur of the NWPR. As a result, as FDEP proceeds with the issuance of new CWA Section 404 permits, it must ensure that any discharges of pollutants into waters protected under the pre-2015 Rule regulatory regime, including discharges into waters outside the scope of the vacated NWPR, which are not otherwise exempted from permitting requirements under that regime (e.g., under Section 404(f)), are authorized by a CWA Section 404 permit. Nothing in Florida's statute or regulations codifies the NWPR and the EPA, therefore, expects Florida to implement the current federal definition of "waters of the United States."

In email correspondence to EPA dated February 2, 2022, FDEP confirmed the Department had applied the NWPR in interpreting the definition of "waters of the United States." Therefore, the information provided did not demonstrate consistency with the CWA or the regulations at 40 C.F.R. Part 233. Accordingly, the EPA objects to FDEP issuing a CWA Section 404 permit for the proposed project.

To address the federal objection, please demonstrate that all waters of the United States, consistent with the pre-2015 Rule regulatory regime, were included and considered for the above-referenced project. As part of this demonstration, FDEP should describe how the Section 404(b)(1) Guidelines (i.e., the federal regulations at 40 C.F.R. Part 230) were addressed for all waters of the United States impacted by the project, including avoidance and minimization measures taken, as well as compensatory mitigation required.

Pursuant to CWA Section 404(j) and 40 C.F.R. § 233.50, FDEP has 90 days from receipt of this letter to work with the applicant to resolve the issues raised in this letter. FDEP may request a public hearing regarding the EPA's objection. If the state neither satisfactorily resolves this objection within 90 days of receipt of this letter or within 30 days of receipt of the EPA's notification that it is reaffirming or modifying the objection following the completion of a public hearing (if one is held under 40 C.F.R. § 233.50(g)), nor denies the permit application, processing of the permit application shall be transferred to the U.S. Army Corps of Engineers.

Thank you for the opportunity to comment on this public notice. If you have any questions regarding this letter, please contact me at 404-562-9345, or Ms. Rosemary Calli, Chief of the Wetlands and Streams Regulatory Section at calli.rosemary@epa.gov or 404-562-9846.

Sincerely,

Denisse D. Diaz, Acting Director
Water Division